

1 WILLIAM H. SHAWN
2 JAMES E. KING (CSB NO. 90103)
3 SHAWNCOULSON, LLP
4 1850 M St., NW. Suite 280
5 Washington, DC 20036
6 Telephone: (202) 331-7900
7 Facsimile: (202) 403-3747

8 ANDREW P. BRIDGES (CSB No. 122761)
9 ILANA S. RUBEL (CSB No. 221517)
10 LIWEN MAH (CSB No. 239033)
11 FENWICK & WEST LLP
12 555 California Street, 12th Floor
13 San Francisco, CA 94104
14 Telephone: 415.875.2300
15 Facsimile: 415.281.1350

16 Attorneys for Defendants
17 IWEB GROUP, INC.,
18 IWEB INTELLECTUAL PROPERTY, INC.,
19 and IWEB TECHNOLOGIES, INC

20 UNITED STATES DISTRICT COURT
21 SOUTHERN DISTRICT OF CALIFORNIA

22 PERFECT 10, INC., a California
23 corporation,

24 Plaintiff,

25 v.

26 IWEB GROUP, INC., a Canadian
27 company d/b/a/ iWeb.com; IWEB
28 INTELLECTUAL PROPERTY, INC., a
Canadian company d/b/a iWeb.com;
IWEB TECHNOLOGIES, INC., a
Canadian company d/b/a/ iWeb.com; and
DOES 1 through 100, inclusive
Defendants.

Case No. 13 CV 0328 BTM BLM

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DEFENDANTS' MOTION TO
DISMISS**

Judge: Hon. Barry Ted Moskowitz
Court: 15B
Date: May 31, 2013
Time: 11:00 A.M.

**NO ORAL ARGUMENT UNLESS
REQUESTED BY COURT**

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FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

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1 **SUMMARY OF POSITION**

2 Plaintiff Perfect 10's complaint fails for at least four compelling threshold
3 reasons.

4 1. This Court lacks personal jurisdiction under Fed. R. Civ. P. 12(b)(2) over
5 Defendants, which have no presence in this Judicial District.

6 2. The doctrine of *forum non conveniens* applies to this more properly Canadian
7 dispute.

8 3. Venue is improper in this Judicial District.

9 4. Perfect 10's complaint fails to state facts sufficient to establish a claim of
10 copyright infringement.

11 This is a second effort by Plaintiff Perfect 10 to select an improper forum in
12 which to litigate its claims against the Canadian iWeb companies. Barely three
13 months ago, after forcing Defendants to expend substantial time, effort, and
14 expense seeking dismissal of a lawsuit Perfect 10 had brought in the U.S. District
15 Court for the District of Columbia, Perfect 10 summarily abandoned its nearly
16 identical, one-count copyright infringement suit against Defendants in that District
17 only to refile in an equally improper location, here in this District.¹

18 This Perfect 10 lawsuit differs from Plaintiff's earlier District of Columbia
19 filing in one profound respect—the core allegations underpinning its jurisdictional
20 and venue assertions are patently false, as Perfect 10 is well aware after having
21 twice been notified. First, in an effort to establish jurisdiction and venue over the
22 Canadian Defendants, Perfect 10 falsely alleged an affiliation between iWeb and
23 _____

24 ¹ Following this Motion's filing to preserve personal jurisdiction objections,
25 Defendants will also seek relief from this Court under Fed. R. Civ. P. 41(d) to
26 require Plaintiff to first reimburse Defendants for their expenses incurred before
27 Perfect 10 summarily dismissed its District of Columbia complaint following
28 Plaintiffs' unilateral dismissal under Fed. R. Civ. P. 41(a).

1 New Dream Network, originally a named defendant in this action. New Dream
2 Network served its Rule 11 motion on Perfect 10 and forced the latter to dismiss it
3 as a Defendant. Second, Perfect 10 continues to insist, incorrectly, that iWeb owns
4 or controls one or more data centers in San Diego. The accompanying declaration
5 of iWeb's Vice President of Finance, Pierre-Luc Toupin ("Toupin Decl."), exposes
6 the falsity of the allegation. iWeb advised Perfect 10 that Defendants operate no
7 data centers anywhere in the United States, whereupon Perfect 10 admitted its only
8 basis for alleging otherwise is an unverified and unexplained statement on a
9 defunct, non-responsive third-party website registered in the Ukraine. iWeb
10 specifically advised Perfect 10 that its allegation of iWeb data centers in California
11 is completely untrue, that it is unsupported by any reliable source, and that it should
12 therefore be withdrawn. Perfect 10, however, refused to remove the allegation, the
13 only surviving basis for Perfect 10's claims of proper venue and jurisdiction,
14 because the complaint is otherwise devoid of any other factual allegations
15 indicating that iWeb has business operations or facilities anywhere in California.

16 After filing over 30 complaints in the Central District of California where
17 Perfect 10 is headquartered² Plaintiff (perhaps in light of a trend against it in that
18 District) started filing copyright lawsuits in this District, evidently hoping for better
19 outcomes. To support its filings in this Court, Perfect 10 has now constructed a
20 fabric of misrepresentation to present this District as a proper venue. Contrary to its
21 representations, however, Perfect 10 remains domiciled in the Central District, and
22 there is no Defendant in this District. Plaintiff was forced to drop New Dream
23 Network as a Defendant after misrepresenting New Dream Network's domicile as
24 this judicial district and after falsely claiming New Dream Network has an
25 affiliation with the iWeb Defendants. Shawn Decl. ¶¶ 9-10.

26 The websites Perfect 10 now identifies are neither owned, operated, nor
27

28 ² See Declaration of William H. Shawn ("Shawn Decl."), Exh. I.

1 controlled by any iWeb Defendant. iWeb Technologies, a Canadian Company with
2 offices, employees and facilities only in Montreal, Quebec, Canada, simply
3 physically stores and supports hardware at its Montreal facilities. iWeb's customers
4 may choose to store their own website or those of third parties with the hardware
5 provided to them—this is something iWeb does not control.

6 Further, not only is there no personal jurisdiction over iWeb Group or its
7 operating company, iWeb Technologies³, but the actual operators of the allegedly
8 infringing websites Perfect 10 cites in its complaint are also apparently not in this
9 judicial district. Since Perfect 10 cannot lawfully join all three iWeb Defendants
10 here, let alone Plaintiffs' 100 Doe Defendants, this forum is an improper venue.

11 Plaintiff's best case, if any, is dismissal under the doctrine of *forum non*
12 *conveniens* that suggests this Court exercise its discretion and dismiss the case so
13 Perfect 10 can bring its case, if it chooses, in Canada. Perfect 10's litigation
14 campaign has also previously extended to the courts of Canada; it can easily reach
15 Canadian companies; and Canadian courts can adjudicate Canadian and United
16 States law.

17 Beyond these threshold jurisdictional and procedural flaws, Perfect 10's one-
18 count complaint fails to allege facts sufficient to state a claim of copyright
19 infringement. The Complaint lacks allegations of volitional acts, fails to allege
20 copying in the United States by the Canadian Defendants or distribution of material
21 objects by sale or other transfer of ownership, and fails to allege acts constituting
22 contributory infringement either by intentional inducement or by furnishing

23 _____
24 ³ Plaintiff insists the three iWeb companies are alter egos, and thus collectively
25 subject to suit and liability. Paragraph 14 of the attached Toupin Declaration rebuts
26 that argument. For brevity and simplicity, however, this Motion may reference the
27 Defendants collectively without waiving Defendants' objections to Plaintiff's alter
28 ego argument.

1 products or services that are incapable of substantial non-infringing use.

2 **STATEMENT OF THE CASE**

3 Perfect 10 is a California corporation based in Los Angeles County, where it
4 has launched over 30 copyright infringement lawsuits against a host of companies
5 and individuals, including Visa, Google, Amazon.com, and Microsoft. Employing a
6 familiar refrain decrying how copyright infringement somehow destroyed its earlier
7 print magazine devoted to depicting “natural” nude women, Perfect 10 consistently
8 claims it only earns some \$80,000 annually from selling subscriptions to its website
9 featuring nude photos.

10 Last November, Perfect 10 filed a nearly identical lawsuit against Defendants
11 in the District of Columbia. *Perfect 10 v. iWeb Techs.*, No. 1:12-cv-1797 (ESH)
12 (D.D.C. Nov. 5, 2012). It summarily abandoned that suit after Defendants filed
13 their motion to dismiss on Rule 12(b) grounds. The current incarnation of
14 Perfect 10’s lawsuit, in this Court, makes identical allegations and seeks the same
15 relief while relying upon facts that Defendants already substantially impeached in
16 the D.C. lawsuit, adding new allegations against New Dream Network and asserting
17 a connection between that company and iWeb.

18 In this action, when New Dream Network served Perfect 10 with a Rule 11
19 motion because of the falsity of Perfect 10’s allegations against it, Perfect 10
20 promptly capitulated and summarily dismissed that Defendant.⁴ Perfect 10 then
21 agreed with iWeb to nullify certain false references in the complaint to an alleged
22 New Dream Network affiliation, yet Perfect 10 refused to amend its complaint to
23 allow this Court to see clearly what little remains of Perfect 10’s original
24
25
26
27

28 ⁴ See Shawn Decl., Exh. E (Rule 11 Motion served by New Dream Network).

1 allegations.⁵

2 Perfect 10's partial annulment of several of its allegations without actually
3 amending its complaint to clarify the implications of that annulment allows
4 Perfect 10 to leave the complaint in a confused status in order to imply that New
5 Dream Network's customers are iWeb customers.

6 The evidence of record, through Defendants' attached declarations,
7 establishes all the Canadian Defendants' activities are in Canada, including the
8 business of Defendant iWeb Technologies, *the only iWeb operating entity* Plaintiff
9 sued. *See, e.g.*, Toupin Decl. ¶¶ 2-10, 14; Declaration of Eric Chouinard ¶¶ 2,4;
10 Declaration of Martin Leclair ¶¶ 2-3. Bluntly, contrary to Perfect 10's allegations,
11 no Defendant has or has ever had any server farm or data center in the United States
12 or anywhere outside Montreal, Quebec, Canada. No Defendant operates any
13 website of which Perfect 10 complains; here, rather, Defendant iWeb Technologies,
14 the only operating company, simply houses in Montreal hardware operated and
15 controlled by thousands of customers which, in turn, operate their own websites (or
16 those of others). *Id.* Plaintiff's allegations as to purported iWeb data centers in
17 California evidently rest solely upon an unexplained statement on a Ukrainian
18 website, "www.sitespeedlab.com." This site provides no description of its
19 information sourcing or methodology, does not identify its operator, does not
20 appear to have been updated since 2011, and its administrator did not respond to
21 counsel's contact attempt. Declaration of Ilana S. Rubel ("Rubel Decl.") ¶¶ 2-12.

22 _____
23 ⁵ As shown in the Shawn Declaration, Perfect 10's excising stipulation left much
24 offending New Dream Network material unscathed in the complaint, and even that
25 which can be ignored by stipulation facially appears included to the uninitiated.
26 Perfect 10's fallacious claims about an iWeb server farm still remain in its
27 complaint, contrary notifications to Perfect 10 notwithstanding. *See* Shawn Decl.,
28 Exhs. G, H.

Perfect 10 is an experienced Canadian litigant where, among other things, it sued Google for copyright infringement. The attached expert Declaration of Jean-Philippe Mikus (“Mikus Decl.”) chronicles Perfect 10’s activities before the Canadian courts. Although Perfect 10 has now chosen the Southern District of California as a venue for its latest lawsuit, the Mikus expert declaration suggests that Canada may be a proper, and better, forum to resolve Perfect 10’s claims.

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS.

No Defendant has a California presence. Perfect 10’s dismissal of New Dream Network, the defendant Perfect 10 erroneously claimed was affiliated with Defendants and based in this District, underscores this. New Dream Network was the linchpin of Perfect 10’s jurisdiction and venue arguments, because the iWeb Defendants have no presence in California. The Court should dismiss the action as to all Defendants for lack of personal jurisdiction.

Perfect 10 bears the burden of establishing personal jurisdiction. As this Court stated in *Nationaleft, Inc., v. Checkgateway, LLC*:

In opposition to a defendant’s motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. In the absence of an evidentiary hearing, “the plaintiff need only make a prima facie showing of the jurisdictional facts.” *Id.* (quotation omitted). “The plaintiff cannot simply rest on the bare allegations of its complaint, but uncontroverted allegations in the complaint must be taken as true. We may not assume the truth of allegations in a pleading which are contradicted by affidavit, but we resolve factual disputes in the plaintiff’s favor.

No. 12cv1498, 2013 U.S. Dist. LEXIS 21305, at *11 (S.D. Cal. Feb. 15, 2013) (Citations and quotations omitted).

The exercise of personal jurisdiction over a nonresident defendant must comport with the state’s long-arm statute and satisfy the due process clause of the

1 United States Constitution. *See Pac. Atl. Trading Co. v. M/V Main Express*, 758
 2 F.2d 1325, 1327 (9th Cir. 1985). “California’s long-arm statute is co-extensive with
 3 federal standards, so a federal court may exercise personal jurisdiction if doing so
 4 comports with federal constitutional due process.” *Boschetto v. Hansing*, 539 F.3d
 5 1011, 1015 (9th Cir. 2008); *see also* Cal. Code Civ. Proc. § 410.10.

6 For a court to exercise personal jurisdiction over a nonresident
 7 defendant consistent with due process, that defendant must have
 8 ‘certain minimum contacts’ with the relevant forum ‘such that the
 9 maintenance of the suit does not offend traditional notions of fair play
 and substantial justice.’

10 *CollegeSource, Inc. v. Academyone, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011)
 11 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1954)). Under a due
 12 process analysis, a defendant may be subject to either general or specific personal
 13 jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,
 14 414 (1984).

15 **A. The General Jurisdiction Standard**

16 A court may assert general jurisdiction over foreign corporations to hear
 17 claims against them when their affiliations with the State are so continuous and
 18 systematic as to render them essentially at home in the forum State. *Goodyear*
 19 *Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). “For
 20 general jurisdiction to exist over a nonresident defendant . . . , the defendant must
 21 engage in ‘continuous and systematic general business contacts, that approximate
 22 physical presence in the forum state.’ *CollegeSource*, 653 F.3d at 1073. The
 23 standard is met only by continuous corporate operations within a state that are
 24 thought so substantial and of such a nature as to justify suit against the defendant on
 25 causes of action arising from dealings entirely distinct from those activities. *Id.*
 26 (quotation omitted). “To determine whether a nonresident defendant’s contacts are
 27 sufficiently substantial, continuous, and systematic, we consider their ‘[l]ongevity,
 28

continuity, volume, economic impact, physical presence, and integration into the state's regulatory or economic markets.” *Id.* (quoting *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1172 (9th Cir. 2006)). “The standard for general jurisdiction is an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world.” *Id.* (quotation omitted).

B. The Specific Jurisdiction Standard

A court exercises specific personal jurisdiction over a defendant only where “the cause of action arises out of or has a substantial connection to the defendant’s contacts with the forum.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002) (citation omitted). The Ninth Circuit analyzes specific jurisdiction according to a three-prong test:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant’s forum related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Boschetto, 539 F.3d at 1016 (quotation omitted).

The plaintiff bears the burden on the first two prongs. If the plaintiff establishes both prongs one and two, the defendant must come forward with a compelling case that the exercise of jurisdiction would not be reasonable. But if the plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed. *Id.*

Under the first prong of the three-part specific jurisdiction test, plaintiff must establish defendant

purposefully availed itself of the privilege of conducting activities in California, or purposefully directed its activities toward California.... [A]vailment and direction are ... two distinct concepts. A purposeful

1 availment analysis is most often used in suits sounding in contract. A
2 purposeful direction analysis, on the other hand, is most often used in
3 suits sounding in tort.

4 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)
5 (citations omitted).

6 Whether an action is based on contract or tort depends upon the nature of the
7 right sued upon, not the form of the pleading or relief demanded. If based on breach
8 of promise it is contractual; if based on breach of a noncontractual duty it is
9 tortious. If unclear the action will be considered based on contract rather than tort.
10 *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1602 (2008).

11 To have purposefully availed itself of the privilege of doing business in the
12 forum, a defendant must have performed some type of affirmative conduct which
13 allows or promotes the transaction of business within the forum state. The
14 purposeful availment requirement tests the fundamental determination of whether
15 “the defendant’s conduct and connection with the forum State are such that he
16 should reasonably anticipate being haled into court there.” *Lake v. Lake*, 817 F.2d
17 1416, 1421 (9th Cir. 1987).

18 For copyright infringement claims, test is met when “plaintiff brings the suit
19 in the forum where the plaintiff resides, and the defendant knows that the plaintiff
20 resides there.” *Brayton Purcell LLP v. Recordon & Recordon*, 361 F.Supp.2d 1135,
21 1140 (N.D. Cal. 2005). If this effects test is met, “[i]t is not required that defendant
22 be physically present within, or have physical contact with the forum, provided his
23 efforts are physically present within, or have physical contact with, the forum.”
24 *Washington Dep’t of Revenue v. www.dirtcheapcig.com., Inc.*, 260 F. Supp. 2d
25 1048 (W.D. Wash. 2003).

26 **C. No Personal Jurisdiction**

27 Here, Plaintiff cannot meet its burden because its bad faith avoidance of its
28 home District eliminates personal jurisdiction under *Brayton*. Similarly, Perfect 10

1 cannot credibly argue general jurisdiction over the iWeb Defendants because those
 2 Defendants have no “substantial, continuous and systemic” presence in California,
 3 as underscored by the absence of the Canadian Defendants’ employees or facilities
 4 of any kind in California or a registration to do business in California. To
 5 manufacture an appearance of a “substantial, continuous and systemic” presence in
 6 California, Plaintiff has falsely alleged that Defendants somehow operate a server
 7 farm at some undisclosed California location. That allegation is as false as was
 8 Perfect 10’s allegations about New Dream Network, yet Perfect 10 has refused to
 9 correct it. **As the attached Toupin Declaration establishes, no Defendant owns**
 10 **or operates any servers in California, contrary to Perfect 10’s erroneous**
 11 **allegations at paragraphs 1 and 7 of its Complaint.** Toupin Decl. ¶¶ 2-9; *see also*
 12 Shawn Decl. ¶ 5, Exh. C; Rubel Decl. ¶¶ 2-12.

13 Perfect 10 also cannot credibly maintain any Defendant committed any
 14 alleged act in this Judicial District to expose any such Defendant to special
 15 jurisdiction. First, contrary to the allegations in paragraph 9 of the complaint, here
 16 iWeb Technologies’ (the only operating iWeb company) activities are limited to
 17 providing server hardware (and related support). The server is controlled by iWeb’s
 18 customers and only they decide which websites may or may not be stored on the
 19 server hardware and to whom the content of such websites is to be transmitted.
 20 Plaintiff’s claim that iWeb is “hosting . . . infringing California based websites”
 21 (*id.*) distorts the true nature of the services offered by iWeb Technologies: here, no
 22 iWeb company decides which website is to be hosted on hardware it provides and if
 23 and where the website’s content may be disseminated. Furthermore, no iWeb
 24 company operates any website other than its own, and iWeb’s own websites have
 25 no relation whatsoever with the Plaintiff’s alleged copyrights. Perfect 10 evidently
 26 aimed that accusation at the supposed connection between iWeb and New Dream
 27 Network, the named Defendant that it has already dismissed with prejudice and
 28 whose alleged connection with iWeb the Plaintiff has now excised from its

1 allegations.

2 Perfect 10's references to one Florida, one unknown, and two Tennessee
3 websites, at paragraph 9 of its complaint, do not support personal jurisdiction in
4 California. In addition to the fact that the iWeb companies do not host websites,
5 Plaintiff cannot show that any alleged infringement on such sites has taken place in
6 California to support special personal jurisdiction. Indeed, Perfect 10 never alleges
7 where any such websites' alleged infringement takes place. *Id.*

8 Finally Plaintiff's reference to iNet Ready in La Jolla, California and KT
9 Tran in San Jose California is puzzling, at best. Although Perfect 10 insists all
10 Defendants have a reseller agreement with those entities, not even Perfect 10's
11 complaint corresponds any such activity to the alleged infringement.

12 At bottom, after enduring a previous round on identical personal jurisdiction
13 issues, it is still apparent Perfect 10 misunderstands the iWeb involved operations.
14 Here, no iWeb Defendant maintains a website hosting any allegedly- infringing
15 content. Defendants only provide hardware and support such hardware in Montreal,
16 Quebec, Canada. As such, no iWeb Defendant has perpetrated or facilitated any
17 acts of infringement anywhere in the United States. Accordingly, there is no lawful
18 general or specific personal jurisdiction over any iWeb Defendants.

19 **II. EVEN IF PLAINTIFF COULD ESTABLISH PERSONAL**
20 **JURISDICTION OVER DEFENDANTS, THIS COMPLAINT**
21 **SHOULD BE DISMISSED UNDER THE DOCTRINE OF *FORUM***
22 ***NON CONVENIENS*.**

23 Even if Perfect 10 were to surmount its personal jurisdiction obstacle, all
24 signs in this dispute point, if anywhere, to the courts of Canada where Perfect 10
25 has previously litigated as the proper location of the dispute. Accordingly, dismissal
26 is proper under the doctrine of *forum non conveniens*.

27 Defendants have proffered an expert opinion of Jean-Philippe Mikus, a
28 leading Canadian copyright law expert, who has carefully explained the alternative

1 Canadian forum's copyright law, and who has provided copies of Canadian court
2 documents chronicling Perfect 10's litigation in Canada, including those
3 establishing *Perfect 10 represented the Canadian forum to be the preferable*
4 *alternative*. Mikus Decl.

5 In *Creative Technologies, Ltd. v. Aztech System PTE, LTE*, 61 F.3d 696, 699
6 (9th Cir. 1995), the Ninth Circuit affirmed a dismissal of a copyright action on
7 *forum non conveniens* grounds. The court stated that the party moving for *forum*
8 *non conveniens* dismissal must demonstrate: (1) the existence of an adequate
9 alternative forum; and (2) that the balance of relevant private and public interest
10 factors favor dismissal.

11 Defendants meet this burden. First, Perfect 10 is not based in this District; it
12 is based in Los Angeles, in the Central District of California where it filed the
13 overwhelming majority of its copyright lawsuits. Judge Huff of this Court recently
14 transferred another case from this District to the Central District, recognizing
15 Perfect 10's lack of connection with this District and its strong connection with the
16 Central District. *See* Rubel Decl., Exh. M [copy of ruling from *Perfect 10, Inc., v.*
17 *Giganews, Inc.*, No. 11-CV-00905 H (MDD) (S.D. Cal. Mar. 8, 2013)].

18 It is also clear any cause of action at issue primarily touches Canadian law
19 since iWeb's activities occur in Canada. Canada's courts are uniquely qualified to
20 resolve any such issues, whether under Canadian or U.S. law, not this Court where
21 Perfect 10 has no legitimate business presence, despite its representations to the
22 contrary. As Mr. Mikus explains in his opinion, the Courts of Canada could even
23 entertain any related U.S. copyright law issues, an insight based, in part, on
24 Mr. Mikus's acknowledgement of the fact that because both countries are
25 signatories to the same international treaty, the 1886 *Berne Convention for the*
26 *Protection of Literary and Artistic Works*, as recently enhanced by the *World*
27 *Intellectual Property Organization Copyright Treaty of 1996*, under which both
28 countries have promulgated similar laws. *See* Mikus Decl., Exh. 4, at ¶ 68.

Besides the foregoing public interest factors, private interests also favor dismissal of this action for Perfect 10 to pursue its claim in Canada. First, all Defendants' witnesses are located in Canada and, by contrast, Perfect 10 has not identified a single witness in this District. Second, discovery in Canada not only is substantially similar to that in the United States, as Mr. Mikus explains, but may actually be far more advantageous to Perfect 10. If the case were to move forward here, Perfect 10's discovery in Canada would be far more expensive and complex, requiring compliance with The Hague Convention and also facing limitations under Canadian law on discovery for foreign litigation that would not exist in Canadian litigation. Indeed, as Mr. Mikus explains, Quebec law would prohibit removal of business information from Canada, so any such discovery by Perfect 10 could well be unlawful when removed to another jurisdiction like California.⁶ Third, Canada is the only conceivable forum where all three Defendants can be found. Similarly, only in Canada can Defendants' vendors and Defendant iWeb Technologies' customers' hardware be found.

Under any perspective, Canada is a far superior forum to resolve Perfect 10's claims. Since American copyright law is not even at the heart of the dispute between iWeb and Perfect 10, there is little justification for prosecuting this action before this Court. The complaint should therefore be dismissed for *forum non conveniens*.

⁶ Mr. Mikus explains, at paragraphs 55 through 68 of his Declaration, that Canadian Federal and Quebec Provincial privacy legislation impedes or outright bars transmission of much information outside Canada. He advised, "if the identity and contact information of customers form part of the business records of a Quebec company, it will be impossible (whether in electronic form or not) for the disclosure of this information to be "compelled." Their disclosure would therefore not be permitted pursuant to Section 18 of the Personal Information Protection Act.

III. VENUE IS IMPROPER IN THIS JUDICIAL DISTRICT.

Perfect 10's lawsuit also offends Fed. R. Civ. P. 12(b)(3) because venue is improper in the Southern District of California. Indeed, given Perfect 10's clear misrepresentation of its business address, in an apparent effort to avoid the Central District of California, and after Perfect 10 also unilaterally abandoned its District of Columbia lawsuit, it is clear Perfect 10 is now forum shopping, a practice to be discouraged. *See generally Am. Cas. Co. of Reading, Pennsylvania v. Krieger*, 181 F.3d 1113, 1119 (9th Cir. 1999); *see also* Rubel Decl., Exh. N [Order (Docket No. 56), *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-00905 (S.D. Cal. Aug. 25, 2011)] (transferring another Perfect 10 copyright case from the Southern District to the Central District of California, noting that Perfect 10 failed to show a specific connection to the Southern District).

On a motion to dismiss under Rule 12(b)(3), a court need not accept the pleadings as true and may consider facts outside the pleadings. *Id.* Once the defendant has challenged the propriety of venue in a given court, the plaintiff bears the burden of showing venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.1979).

Venue is improper under 28 U.S.C. § 1391 where a court lacks personal jurisdiction, and therefore the arguments above regarding the lack of personal jurisdiction apply also to establish that venue is improper in this District. Neither Defendants nor Plaintiff resides here. Even New Dream Network resided in the Central District, not here. As such, this District has no connection to the Parties or this dispute. Defendants' *forum non conveniens* arguments also lend support to the venue objections here. The complaint should therefore be dismissed.

IV. PERFECT 10'S COMPLAINT FAILS TO STATE FACTS SHOWING COPYRIGHT INFRINGEMENT.

Apart from the personal jurisdiction and venue defects, Perfect 10's claim for copyright infringement fails because Plaintiff (in its second attempt to plead a case

1 against iWeb) never alleges the elements necessary to state a claim for direct or
 2 secondary infringement. The Court should therefore dismiss the action with
 3 prejudice. Specifically, (i) Perfect 10 fails plausibly to allege volitional acts, which
 4 failure materially erodes all its direct infringement claims; (ii) Perfect 10 fails to
 5 allege copying in the United States; and (iii) Perfect 10 does not allege acts of
 6 intentional inducement or that Defendants' services or products are incapable of
 7 substantial non-infringing use.

8 Dismissal of a claim is appropriate when a plaintiff fails to plead facts
 9 demonstrating a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.
 10 662, 678; 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S.
 11 544, 570 (2007)). The well-pleaded allegation rule, where allegations must be
 12 accepted as true, does not apply to legal conclusions. *Id.* A complaint with "naked
 13 assertion[s]" devoid of "further factual enhancement" is insufficient to survive a
 14 motion to dismiss. *Id.* The "plausibility standard . . . asks for more than the sheer
 15 possibility that a defendant has acted unlawfully." *Id.* Courts may rightly consider,
 16 on a motion to dismiss, documents to which pleadings refer. *Lee v. City of Los*
 17 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

18 **A. Perfect 10 Fails to State a Claim for Direct Infringement.**

19 **1. Perfect 10 Fails to Allege Volitional Infringing Acts.**

20 For direct infringement, Perfect 10 must allege Defendants violated at least
 21 one of Perfect 10's copyright rights under 17 U.S.C. § 106. *See A&M Records, Inc.*
 22 *v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Here, however, Perfect 10
 23 fails to allege facts showing that iWeb engaged in any "volitional" act of
 24 infringement — a prerequisite for any direct infringement claim. Perfect 10's
 25 omission is fatal because direct infringement requires "some element of volition or
 26 causation" by a defendant. *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 297 (E.D.
 27 Pa. 2006); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006);
 28 *Costar Group v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) ("*Loopnet*") ;

1 *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008)
2 (“*Cablevision*”).

3 Courts regularly hold Internet service providers’ automated activities,
4 including those Perfect 10 now challenges, are not “volitional” acts causing
5 violation of any Section 106 right; consequently, such acts do not support a claim
6 for direct infringement. *See, e.g., Field*, 412 F. Supp. 2d at 1115 (Google not liable
7 for automatic copying during search engine’s “caching” process); *Loopnet*, 373
8 F.3d at 555 (ISP not liable for system by which users could upload copyrighted
9 photographs). Courts, including this one, also apply this causation requirement in
10 other contexts. *See Fox Broad. Co., Inc. v. Dish Network*, No. 12-04529, 2012 WL
11 5938563, at *7-11 (C. D. Cal. Nov. 7, 2012) (“*Dish*”) (Dish Network not liable
12 because users of its DVR service were the “most significant and important cause”
13 of the copy); *Cablevision*, 536 F.3d at 131 (Cablevision not liable where users of its
14 remote storage DVR caused the copies). As the Second Circuit explained, “a
15 significant difference exists between making a request to a human employee, who
16 then volitionally operates the copying system to make the copy, and issuing a
17 command directly to a system, which automatically obeys commands and engages
18 in no volitional conduct.” *Cablevision*, 536 F.3d at 131.

19 Merely operating a system that automatically copies and stores materials and
20 makes them available to others “does not constitute any volitional act” to support a
21 claim for direct infringement. *See Rubel Decl., Exh. M*, at 10-11 (finding that
22 Perfect 10 failed sufficiently to allege defendants themselves committed the alleged
23 infringing acts); *see also Religious Tech. Ctr. v. Netcom On-line Commc’n Sers.,*
24 *Inc.*, 907 F. Supp 1361 (N.D. Cal. 1995). Direct liability applies only to users
25 responsible for posting the infringing articles. *See Id.* at 1372-73; *Ellison v.*
26 *Robertson*, 189 F. Supp. 2d 1051, 1057 (C.D. Cal. 2002), *rev’d in part on other*
27 *grounds*, 357 F.3d 1072 (9th Cir. 2004).

28 Here, Perfect 10 fails to plead facts plausibly demonstrating iWeb engaged in

any volitional infringing act; to the contrary, the Complaint refers to the actions of third party customers using iWeb’s computer servers. For example, Perfect 10 alleges iWeb’s servers host websites and refers to “infringing websites operated in California” but makes no factually supported allegation that iWeb owned, created, operated, or directed those websites. Compl. ¶¶ 21, 26. Perfect 10 cites iWeb’s “more than 21,000 customers in 150 countries” but never alleges that iWeb owns, operates, or directs any such customers, let alone that any engaged in the alleged copying.⁷ *Id.* Perfect 10 does not—and cannot—offer any factual allegations that iWeb has any involvement with customers’ websites, except maintaining computer servers and using automated processes in facilitating customers’ use of those servers. Perfect 10 thus fails to state a claim for direct liability.

Even where a party can determine the content on a server (which is not typically the case for iWeb because servers are customer-controlled), that would not suffice for a claim of direct infringement. *See* Rubel Decl., Exh. M, at 11 (“[a]ll owners of internet servers presumably can determine the content on their servers. To hold that such control gives rise to a direct infringement claim would create ‘unreasonable liability.’”).

Perfect 10 also alleges iWeb “could have and should have ended the [third parties’ alleged] infringement” by “removing the infringing images or by refusing to host the identified allegedly infringing websites.” *Id.* ¶ 28. But these allegations do not suggest any volitional act by iWeb to cause the alleged infringement by those websites or images. Whether iWeb has any control over the supposedly infringing content after it is already on the server is irrelevant. *See Dish*, 2012 WL 5938563, at *10 (noting that control after the copies are made has no bearing on whether the provider causes the copies in the first place); *Loopnet*, 373 F. 3d at 547

⁷ The only implication to the contrary is a boilerplate paragraph, lacking any factual allegation, aimed at 100 “Doe” defendants. *Id.* ¶ 24.

1 (holding that ISP's ability to delete content was not relevant to volition, which
2 focuses on the conduct that caused the copy).

3 Even where a defendant has had far more involvement than merely providing
4 computer servers for another to operate, courts have found the requisite volition for
5 infringement to be lacking. In *Field*, the court held that Google, which designed an
6 automated program to "crawl" the Internet for websites that it would then copy and
7 store in a cache for quick retrieval for Google's search engine, did not engage in a
8 volitional act of infringement. 412 F. Supp. 2d at 1115 (finding "Google is passive
9 in the process" and "Google's computers respond automatically to the user's
10 request."). In *Loopnet*, the Fourth Circuit held that an ISP that allowed the upload
11 of images without the copyright owner's authorization lacked the requisite volition
12 for infringement even though, before making images publicly viewable, the ISP
13 automatically copied uploaded images to an internal computer to be screened by an
14 employee for obvious indicia of infringement. 373 F.3d at 555 (ISP not liable for
15 system by which users could upload copyrighted photographs). The *Loopnet* court
16 explained:

17 There are thousands of owners, contractors, servers, and users
18 involved in the Internet whose role involves the storage and
19 transmission of data in the establishment and maintenance of an
20 Internet facility. Yet their conduct is not truly "copying" as understood
21 by the Act; rather, they are conduits from or to would-be copiers and
22 have no interest in the copy itself. . . . To conclude that these persons
23 are copyright infringers simply because they are involved in the
24 ownership, operation, or maintenance of a transmission facility that
25 automatically records material — copyrighted or not—would miss the
26 thrust of the protections afforded by the Copyright Act.

27 *Id.* at 551 (citation omitted); *see also UMG Recordings v. Shelter Capital Partners*,
28 No. 09-55902, --- F.3d ----, 2013 WL 1092793, at *9 (9th Cir. Mar. 14, 2013)
(distinguishing copying processes "initiated entirely at the volition of [] users" from
acts of a defendant who "actively participate[s] in or supervise[s] file uploading" or
"preview[s] or select[s] the files before the upload is completed.").

1 **2. Perfect 10 Fails to Allege Copying in the United States.**

2 Further, since Perfect 10 voices no factual allegations of infringing acts in the
3 United States to support any claim of direct copyright infringement against iWeb, it
4 fails to state such a claim as a matter of law. The United States' Copyright Act does
5 not reach acts outside the United States. *See Subafilms, Ltd. v. MGM-Pathe*
6 *Commc'ns, Co.*, 24 F.3d 1088, 1091 (9th Cir. 1994) (*en banc*); *Omega S.A. v.*
7 *Costco Wholesale Corp.*, 541 F.3d 982, 987-88 (9th Cir. 2008). In *Subafilms*, the
8 Ninth Circuit reaffirmed the "undisputed axiom" that the "United States' copyright
9 laws have no application to extraterritorial infringement," noting "the principle of
10 territoriality consistently has been reaffirmed." 24 F.3d at 1095-96 (citations
11 omitted). The Ninth Circuit rejected the assertion that the Copyright Act could
12 cover acts outside the United States, if the acts cause "adverse effects" in the United
13 States, and declined to extend extraterritorial application of the statute unless
14 Congress clearly expressed its intent to do so. *Id.*

15 Here, Perfect 10 acknowledges that Defendants "are Canadian companies"
16 (Compl. ¶ 20), and indeed iWeb has no operations, offices, or corporate registration
17 in the United States, yet the Complaint provides no factual allegations or plausible
18 basis to conclude iWeb copied or engaged in any infringing acts within the United
19 States. Perfect 10 only alleges "infringing websites operated in California" (*id.* ¶
20 21), that certain websites have Internet registrations in the United States (*id.* ¶ 26),
21 and that iWeb conducts business with California customers (*id.* ¶ 1), but it glaringly
22 omits any allegation that the storage or copying for those infringing websites occurs
23 outside Canada.

24 As noted, iWeb has no data centers in this district or anywhere else outside
25 Canada, contrary to Perfect 10's mistaken assertions.⁸ If iWeb had computer servers

26
27 ⁸ Defendants have attempted to resolve informally such erroneous allegations
28 without success at this writing. *See* Shawn Decl. ¶ 11.

1 and conducted web hosting anywhere the United States, Perfect 10 tellingly fails to
 2 claim any of the allegedly-infringing activity involved such U.S.-based servers.
 3 Furthermore, even if iWeb authorized American vendors to resell space on iWeb's
 4 dedicated servers—which it does not—such would not alter the truth that any
 5 copying could only occur in Canada, the locus of iWeb's servers. While Perfect 10
 6 does allege users in the United States infringed by downloading its copyrighted
 7 images, that third party conduct would do nothing to establish a claim of direct
 8 infringement against iWeb. Accordingly, any claim of direct infringement must be
 9 dismissed for failure to state a claim.

10 **B. Perfect 10 Fails to State a Claim for Contributory Infringement.**

11 **1. Perfect 10 Does Not Allege Acts of Intentional Inducement.**

12 A defendant “infringes contributorily by intentionally inducing or
 13 encouraging direct infringement” by a third party. *See Metro-Goldwyn-Mayer*
 14 *Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“*Grokster*”). The *Grokster*
 15 standard requires “‘active steps . . . taken to encourage direct infringement,’ such as
 16 advertising an infringing use or instructing how to engage in an infringing use,
 17 [which] show an affirmative intent that the product be used to infringe, and a
 18 showing that infringement was encouraged overcomes the law’s reluctance to find
 19 liability when a defendant merely sells a commercial product suitable for some
 20 lawful use.” *Id.* at 936 (citations omitted).

21 *Grokster* thus clarified two important limitations on contributory liability.
 22 First, mere knowledge of infringement is not enough; intent to induce or encourage
 23 it is required. Second, wrongful intent does not arise merely from knowledge that
 24 the product or service is being used to infringe where it is also capable of
 25 substantial non-infringing uses. *Grokster*, 545 U.S. at 933; *see also Sony Corp. of*
 26 *Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (no liability where
 27 manufacturer knew some customers would infringe). Rather, to impute intent to
 28 encourage infringement, a court must find that the defendant “knowingly takes

1 steps that are substantially certain to result in such direct infringement.” *Perfect 10*,
 2 *Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007). A defendant must
 3 “‘ha[ve] actual knowledge that specific infringing material is available using its
 4 system,’ and can ‘take simple measures to prevent further damage’ to copyrighted
 5 works, yet continues to provide access to infringing works.” *Id.* at 1172 (emphasis
 6 in original) (citations omitted). Here, Perfect 10 fails to allege facts showing
 7 Defendants’ intent to induce or encourage infringement or Defendants’ failure to
 8 take “simple measures” to avoid infringements in the face of any actual knowledge
 9 of specific infringing activity.

10 The *Grokster* doctrine holds inducement liability may be imposed only where
 11 a product or service is provided “with the object of promoting its use to infringe
 12 copyright, as shown by clear expression or other affirmative steps taken to foster
 13 infringement.” *Columbia Pictures Indus. v. Fung*, No. 10-55946, --- F.3d ----, 2013
 14 WL 1174151, at *11 (9th Cir. Mar. 21, 2013) (citing *Grokster* 545 U.S. at 936-37).
 15 *Grokster* “requires a high degree of proof of the improper object.” *Id.* Thus, for
 16 inducement liability, “it is crucial [for Plaintiff] to establish that [Defendants]
 17 ‘communicated an inducing message to their . . . users,’ the classic example of
 18 which is an ‘advertisement or solicitation that broadcasts a message designed to
 19 stimulate others to commit violations.” *Perfect 10, Inc. v. Visa Intl Serv. Ass’n*, 494
 20 F.3d 788, 801 (9th Cir. 2007) (quoting *Grokster*, 545 U.S. at 937) (emphasis
 21 added).

22 Perfect 10 has not even approached pleading facts necessary to state a claim
 23 under an inducement theory, and could not credibly do so, because iWeb is a
 24 passive provider of dedicated servers, and has no input or control over what
 25 customers choose to put on their servers. Perfect 10 thus understandably fails to
 26 allege facts to show iWeb purportedly encouraged infringing use, or even that
 27 Defendants communicated any affirmative message. Tellingly, iWeb’s alleged
 28 conduct, supposedly showing that iWeb “induced, caused, and/or materially

1 contributed” to infringement, was merely “allowing” infringement “to continue on
2 their servers,” operating unidentified websites, and “providing hosting and Internet
3 services.” Compl. ¶ 35. Without more, providing and continuing to provide
4 customers use of computer servers, without active steps or clear expressions
5 constituting encouragement or inducement of infringement by the users of the
6 servers, does not meet the *Grokster* test. Nor does a naked allegation that iWeb
7 operates websites, with no mention of what those websites were or what they
8 display, support an infringement claim.

9 **2. Perfect 10 Does Not Allege that Defendants’ Services or**
10 **Products Are Incapable of Substantial Non-Infringing Uses.**

11 In *Grokster*, the Supreme Court, following Sony, ruled that intent may not be
12 imputed from general knowledge that a product is being used to infringe where it is
13 capable of substantial non-infringing uses. *See Grokster*, 545 U.S. at 933; *Sony*, 464
14 U.S. at 442. The Ninth Circuit has explained that this standard also applies to
15 services and not just products. *See Fung*, 2013 WL 1174151, at *10. Computer
16 servers, and websites that may be stored on them, are capable of non-infringing
17 uses. Perfect 10 cannot seriously allege that all or most servers and websites engage
18 in infringement of its copyrighted works. Likewise, Perfect 10 never alleges that
19 only infringers use iWeb’s dedicated servers.

20 Since Perfect 10 has not alleged plausible facts under *Iqbal* and *Twombly*
21 supporting any basis for imputing intent to induce infringement, the Court should
22 dismiss the claim for contributory infringement.

23 **CONCLUSION**

24 Because this Court lacks personal jurisdiction, this District is an improper
25 and inconvenient venue, and Perfect 10 has failed to state any copyright claim
26 against Defendants, notwithstanding this its second effort to sue the Defendants,
27 this Court should dismiss Perfect 10’s lawsuit in its entirety with prejudice.
28 Defendants separately furnish a proposed form of order.

1 Dated: April 22, 2013

SHAWNCOULSON LLP

3 By: /s/ James E. King

4 James E. King

5 Attorneys for Defendants
6 IWEB GROUP, INC.,
7 IWEB INTELLECTUALPROPERTY,
8 INC., and
9 IWEB TECHNOLOGIES, INC.

10 Email: jking@shawncoulson.com

11 LIT/1356468.3

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO